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Written statement* submitted by Center for Applied Legal Studies

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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A. Introduction

1. About the Centre for Applied Legal Studies

1.1. The Centre for Applied Legal Studies ('CALS') welcomes the opportunity to make submissions to the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights ('IGWG') ahead of its first session in July 2015.

1.2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, South Africa. Its vision is a socially and economically just country where human rights are promoted, respected, protected and fulfilled by the state, corporations, individuals and other repositories of power.

1.3. CALS seeks to actualise its vision by challenging the structural nature of poverty and inequality, the global dynamics that sustain it and the repositories of power that perpetuate it.

1.4. CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. The business and human rights programme is the most recent addition to CALS' programmatic work and focuses on the role of corporate entities in causing or mitigating human rights violations. The focus of this programme is to ensure that economic theory and financial regulation are at the heart of human rights lawyering, with a view to challenging not only individual corporate malfeasance but also systems of international trade and finance that exacerbate poverty in the Global South.

2. CALS' Submission in brief: Gender and Poverty

2.1. CALS submits that the IGWG should take a gendered lens to both the process for the elaboration of the binding instrument and the content of the binding instrument. Similarly, we submit that poverty should be a consideration by the IGWG in both the process and the content of the binding instrument.

2.2. We recommend that the IGWG do what follows to acknowledge the rights that exist in international and regional law vis-à-vis gender equality and poverty alleviation and align the instrument with these instruments. We do so in the hope that the IGWG will not lose this opportunity to address the multifaceted and intersectional human rights impacts of corporate activities.

B. Gender and a binding instrument

3. Gendered Human Rights Impacts of Corporate Conduct

3.1. Corporations' activities have a gendered and often gender discriminatory impact. Gender refers to the norms and roles that are socially and culturally ascribed to people based on their sex. The impact of these ascribed roles and norms are differentiated and discriminatory: women are often discriminated and adversely affected by standards that appear non-discriminatory on their face but have a discriminatory impact in reality; this is particularly the case with regards to corporations' activities. The adverse gendered impact of corporations activities can be both internal (i.e. related to the employer/corporation and

employee relationship) and external (i.e. related to the corporation's relationship with the community and state).[1]

3.2. An example of corporations' external human rights impact may be garnered from the world's poverty demographics. Women comprise half of the world's population, but make up the majority of the world's poor. On average, women earn a little over half what men earn. According to UN Women, globalisation has had a particularly disproportionate impact of women as it leads to the reduction in public spending and social programmes, and pushes the costs of the family onto women, who bear that burden because of their gender.[2]

3.3. Another example of the gendered discriminatory impact of corporations' activities may be found in the consultation methodologies employed by corporations prior to operating in a particular area. Oftentimes it is men, as the traditional leadership of communities or heads of families, who are consulted by corporations, to the exclusion of women. This is a clearly a discriminatory activity employed by corporations that results in the marginalisation and victimisation of women and should, among other things, be addressed in the binding instrument as well as the elaboration process for the binding instrument.

4. Rationale for the Adoption of a Gender Perspective

4.1. There are three reasons why a binding instrument should adopt a gender perspective.

4.2. First, the failure to adopt a gendered lens in either the process of the developing a binding instrument or in the determination of the content of a binding instrument would be a missed opportunity to note and meaningfully address contextualised discrimination and would result in context-blind remediation. The gendered analysis would uncover the variety of other ways in which corporate malfeasance affects the most vulnerable based on, inter alia, race, poverty, location, culture, age, sexual orientation, belief and disability.3 It would also open the door to an intersectional approach to understanding and ameliorating human rights violation.

4.3. Second, failing to adopt a gendered lens would be a departure from one of the basic tenants of international human rights law. Gender has been on the UN's agenda since the latter's inception and, more recently, on the UN's business and human rights agenda. In 2003 the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights spoke to the right to equality for men and women.[4] While extending his mandate, the Human Rights Council also instructed the then Special Representative of the Secretary-General (on the issue of human rights and transnational corporations and other business enterprises), Prof John Ruggie, to integrate a gender perspective throughout his work.[5] After submissions were made to Prof Ruggie by

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1 B Meyersfeld, 'Business, human rights and gender: a legal approach to external and internal considerations' in S Deva and D Bilchitz (ed) Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect, at 193.

2 UN Women, Feminisation of Poverty: Factsheet No. 1, available at http://www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm (11 June 2015).

3 Meyersfeld, above note 1, at 201.

4 Preamble and article 2 of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

5 Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Resolution 8/7 (18 June 2008).

the Gender, Business and Human Rights Reference Group,[6] gender was incorporated into the UN Guiding Principles on Business and Human Rights ("UNGPs").[7] The UNGPs speak of:

4.3.1. States' duty to advise corporations on how to consider effectively issues of gender;

4.3.2. States' duty to provide adequate assistance to business enterprises to assess and address gender-based and sexual violence; and

4.3.3. Businesses' human rights tracking by means of gender-disaggregated data.[8]

4.4. Third, an awareness of gendered human rights is evident in international law instruments, including: the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Vienna Declaration, and UN Millennium Declaration.[9] A gendered approach to the production and content of a binding instrument aligns with international human rights law, beyond business and human rights.

5. How to Approach a Gender Perspective

5.1. A gendered analysis should be incorporated into both the process for the adoption of a binding instrument and its ultimate scope, nature and content.

5.2. With regards to process: access to the first session of the IGWG has been restricted to ECOSOC-Accredited NGOs.[10] This restriction could impair marginalised people's participation in process of developing a binding instrument, especially those who have historically been marginalised and victimised, i.e. women. ECOSOC accreditation is limited to non-governmental organisations. This means that individuals or communities who have been directly affected by corporate malfeasance, are excluded unless they have registered as NGOs. It is important therefore that affected communities and individuals (particularly women) be permitted to attend the sessions of IGWG or be consulted by the IGWG in the development of the instrument through other accessible means.

5.3. We recommend that the IGWG adopt an approach of gender mainstreaming to the nature, scope and content of the binding instrument as required by the Beijing Platform for Action.[11] This means that the IGWG should (a) expressly provide for equality as a value and a right; (b) acknowledge that the adverse human rights impacts of business activities may be gendered; and (c) mainstream a gendered approach by:

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[6] K Dovey et al., Comments on the draft 'Guiding Principles' for the implementation for the 'Protect, Respect and Remedy' Framework: Integrating a Gender Perspective, January 2011, available at http://business-humanrights.org/sites/default/files/media/documents/ruggie/joint-submission-re-guiding-principles-integrating-a-gender-perspective-jan-2011.pdf.

[7] Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (21 March 2011).

[8] UNGPs 3, 7 and 20 and their general commentaries respectively.

[9] Article 2 of the Universal Declaration on Human Rights, articles 2(1), 4, 24 and 26 of the International Covenant on Civil and Political Rights, article 2(2) of the International Covenant on Economic, Social and Cultural Rights, articles 18, 38 and 39 of the Vienna Declaration and Programme of Action, and article 4 of United Nations Millennium Declaration.

[10] See http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx.

[11] UN General Assembly, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women (22 December 1995) UN Doc. 50/203.

5.3.1. assessing the implications for women and men of the process for the development of the binding instrument and the nature, content and scope of the binding instrument;

5.3.2. ameliorating or preventing the adverse gender implication in both the process for and the content of the binding instrument (by including specific clauses that speak to women's experiences such as sexual harassment and pay discrimination); and

5.3.3. mandating a committee to monitor and evaluate the effectiveness of the instrument process and content in preventing and ameliorating gender discriminatory business practices.

C. POVERTY AND THE BINDING INSTRUMENT

6. Poverty as a Human Rights Violation

6.1. The realities of poverty violate, among others, the right to human dignity. Poverty is expansive — in that it affects a large number of people — and severe — in that its impact on people's lives is grave and multifaceted. According to Oxfam, in 2014 the richest 1% of people in the world owned 48% of the world's wealth, leaving just 52% to be shared between the other 99% of the world's population.[12] The poorest people in the world (who account for 80% of the world's population) share 5.5% of the world's wealth. World Bank statistics show that in 2011 46.8% of the people living in Sub-Saharan Africa lived in a state of poverty.[13]

6.2. However, poverty is not purely about financial resources, it also extends towards other facets of life. A report released by the United Nations Development Programme in 2014 indicated that Sub-Saharan Africa (wherein almost 50% of people live in poverty) has the lowest Human Development Index Value, life expectancy, and expected schooling of any region in the world.[14] This means that poverty's effect goes beyond a lack of financial resources towards a lack of resources generally. Because of this, people living in poverty are, and remain, in a cycle of poverty. As former UN General Secretary, Kofi Annan, said:

> "People who live in poverty generally describe it as a vicious circle, since they are confronted by a wide range of misfortunes which are interlinked and hard to overcome. Indeed, being deprived of resources makes it impossible for anyone to afford the most basic human needs or to enjoy the most fundamental human rights specified in the Universal Declaration of Human Rights, such as the right to housing, to a decent standard of living, to education, to health, to work, to life, and to participate in social, cultural, civil and political life, among others. Living in poverty involves the denial of human rights as a whole."[15]

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[12] Oxfam, Wealth. Having it all and wanting more, available at http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf (17 June 2015).

[13] World Bank, Poverty and Equity Regional Dashboard: Sub-Saharan Africa, available at http://povertydata.worldbank.org/poverty/region/SSA (17 June 2015).

[14] United Nations Development Programme, Human Development Index Report, available at http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf (17 June 2015), at 34.

[15] K Annan, Poverty: An Obstacle to Human Rights, available at http://www.un.org/rights/poverty/poverty5.htm (1 March 2015).

7. Rationale for Denouncing Poverty in a Binding Instrument

7.1. Poverty is the culmination of a variety of human rights violations. Any instrument that attempts to remedy, ameliorate or prevent human rights violations must be mindful of the fact that poverty itself is a human rights violation and therefore seek to remedy, ameliorate or prevent it specifically. This is especially the case when the instrument speaks to the agents of economic development i.e. states and corporations.

7.2. It is often assumed that deregulation or non-regulation leads to increased business activity which leads to increased economic development which itself leads to a reduction in poverty. This is not the case for a number of reasons.

7.3. The first is because corporations often operate in – and benefit from – areas of weak governance and high rates of poverty and thus rely on the same to maximise profit. It is, therefore, not in the interests of such business enterprises effectively to address poverty.

7.4. The second reason why an instrument should focus on poverty is because national economic development does not necessarily result in the reduction of poverty of individuals.[16] Therefore, not regulating businesses' creation and exacerbation of, or benefit from, poverty, by means of a binding instrument would be to fail to address poverty, and thus a failure to regulate human rights non-compliance.

7.5. In including mention of poverty the binding instrument would not be creating new and unknown international law; it would in fact be aligning the binding instrument with existing international laws and obligations. For instance, in 2000, members of the UN General Assembly approved the UN Millennium Declaration which provided that they would "create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty".[17] States have also agreed to take steps to eradicate poverty through, inter alia, the International Labour Organisation, African Union and Southern African Development Community.[18] In addition, the UN Guiding Principles on Extreme Poverty articulate clearly the legal obligation to alleviate poverty globally.[19]

7.6. Poverty is structural and systemic in nature and should be addressed in a structural, systemic and meaningful way i.e. by means of a binding instrument that both denounces it and calls upon agents of economic development (states and corporations) to address it. Furthermore, denouncing poverty will ensure that the binding instrument does not speak only to gross human rights violations and therefore does not lose its impact.

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[16] See generally, M Krongkaew et al. Economic growth, employment, and poverty reduction linkages: The case of Thailand, available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_120671.pdf (22 June 2015).

[17] UN General Assembly, UN Millennium Declaration (8 September 2000) UN Doc A/55/L.2, at article 12.

[18] International Labour Organisation, Declaration concerning the aims and purposes of the International Labour Organisation (10 May 1944), preamble; African Union, Declaration on Employment and Poverty Alleviation in Africa (9 September 2004) AU Doc EXT/ASSEMBLY/AU/3 (III); and Southern African Development Community, Declaration on Poverty Eradication and Sustainable Development (20 April 2008).

[19] UN Human Rights Council, Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/21/39 (18 July 2012).

8. Approach to Denouncing and Addressing Poverty in the Binding Instrument

8.1. We therefore submit that a binding instrument should:

8.1.1. expressly denounce poverty as a violation of human rights;

8.1.2. include practical provisions requiring corporations and states not to exploit contexts of poverty;

8.1.3. provide for mechanisms to address the human rights violations caused by wages that do not constitute a living wage; and

8.1.4. create obligations regarding post-operation activity that leave affected communities in better socio-economic conditions than before the corporate activities began.

8.2. We also recommend that the IGWG makes the process for the elaboration of a binding instrument one that is inclusive of the most marginalised and impoverished people. We therefore suggest that in-country consultations be held on the content, scope and nature of a binding instrument, especially with those adversely affected by corporate activity.

D. Conclusion

9. In conclusion, corporations can cause gender and poverty-based harm. The attenuation of the harm, in this submission, foreground the fact that harm is not experienced in a homogeneous way and is structural in nature and design. Addressing poverty or gender inequality in a binding instrument would not be a departure from, but an alignment with, existing international law instruments. Therefore the IGWG should ensure that both the content, and the process towards the creation, of a binding instrument are inclusive and remedial to poverty and gender-based considerations.